

Message Text

PAGE 01 STATE 105775

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TO USMISSION GENEVA

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TAGS: UNCTAD, EIND, TGEN

SUBJECT: UNCTAD: INTERGOVERNMENTAL GROUP OF EXPERTS ON
CODE OF CONDUCT ON TRANSFER OF TECHNOLOGY, MAY 5-16

FOR ROBERT ALLEN/USDEL

1. QUOTED BELOW FOR USDEL'S INFORMATION ARE COMMENTS JUST
RECEIVED FROM THE COUNCIL OF THE AMERICAS REGARDING A CODE
OF CONDUCT FOR TRANSFER OF TECHNOLOGY:

2. QUOTE: THE COUNCIL OF THE AMERICAS REITERATES THE
BELIEF--EARLIER EXPRESSED IN THE THIRD OF THE FOUR DOCU-
MENTS CONTAINED IN THE WORKING PAPER, CODES OF CONDUCT FOR
THE TRANSFER OF TECHNOLOGY: A CRITIQUE--THAT ADOPTION OF A
LEGALLY-BINDING CODE WOULD BE UNDESIRABLE FOR THE FOLLOWING
UNCLASSIFIED

PAGE 02 STATE 105775

REASONS:

-- A) THE GOVERNMENT OF EVERY DEVELOPING COUNTRY CAN PRE-
VENT THE IMPORTATION OF TECHNOLOGY THAT IT CONSIDERS

INAPPROPRIATE OR THE IMPORTATION OF APPROPRIATE TECHNOLOGY ON TERMS AND CONDITIONS THAT IT CONSIDERS INAPPROPRIATE. BUT NO GOVERNMENT CAN COMPEL THE OWNERS OF TECHNOLOGY IN OTHER COUNTRIES TO EXPORT TECHNOLOGY WHICH THEY DO NOT WISH TO EXPORT OR WHICH THEY WOULD BE WILLING TO EXPORT ONLY

UNDER DIFFERENT TERMS AND CONDITIONS. NO TRANSFER OF TECHNOLOGY WILL TAKE PLACE UNLESS EACH PARTICIPANT--THE TRANSFEROR AND TRANSFEREE, WHETHER PRIVATE OR PUBLIC--BELIEVES IT WILL DERIVE SUFFICIENT NET BENEFITS FROM THE TRANSFER.

-- B) IT IS REASONABLE TO ASK ALL PARTICIPANTS IN TECHNOLOGY TRANSFERS TO ADHERE TO CERTAIN GENERAL PRINCIPLES, SUCH AS THOSE IN THE ICC GUIDELINES. ON THE OTHER HAND, GREAT CARE SHOULD BE TAKEN TO AVOID UNNECESSARY RIGIDITY OR SPECIFICITY WITH REGARD TO THE FORMULATION OR APPLICATION OF THOSE PRINCIPLES. THERE IS AN INFINITE RANGE OF POSSIBLE VARIATIONS AMONG THE POSSIBLE ATTRIBUTES, DIMENSIONS, AND EFFECTS OF TECHNOLOGY AND TECHNOLOGY TRANSFERORS AND TECHNOLOGY RECIPIENTS. CONDUCT IN TECHNOLOGY TRANSFERS THAT MAY BE DEEMED HARMFUL BY THE TRANSFERORS, THE RECIPIENTS OR THEIR RESPECTIVE COUNTRIES IN ONE SET OF CIRCUMSTANCES MAY BE DEEMED BENEFICIAL BY ONE OR MORE OF THOSE PARTICIPANTS IN OTHER CIRCUMSTANCES. UNNECESSARY RIGIDITY OR SPECIFICITY WITH REGARD TO THE FORMULATION OR APPLICATION OF GENERAL PRINCIPLES MAY PREVENT TRANSFERS OF TECHNOLOGY THAT ALL OF THE PARTICIPANTS WOULD HAVE CONSIDERED DESIRABLE.

-- C) UNCERTAINTIES ARE INEVITABLE CONCERNING THE MANNER IN WHICH ANY LEGALLY BINDING CODE OF CONDUCT WOULD BE ENFORCED, AND THOSE UNCERTAINTIES ARE LIKELY TO DETER SOME OF MANY TRANSFERS OF TECHNOLOGY EVEN WHEN IT IS CONSIDERED LIKELY THAT THE ENFORCEMENT AUTHORITIES WILL HAVE THE NECESSARY TECHNICAL EXPERTISE, AND WILL ACT EXPEDITIOUSLY AND FAIRLY. HOWEVER CAREFULLY A CODE OF CONDUCT MIGHT BE WORDED, TECHNOLOGY OWNERS WOULD OFTEN BE ALARMED

UNCLASSIFIED

PAGE 03 STATE 105775

BY THE POSSIBILITY THAT THE AUTHORITIES MIGHT ARRIVE AT UNFAVORABLE JUDGEMENTS CONCERNING THE NATURE OF SPECIFIC TECHNOLOGIES AND/OR MIGHT MAKE UNFAVORABLE ESTIMATES OF THEIR FUTURE DIRECT AND INDIRECT ECONOMIC AND SOCIAL COSTS, AND THEIR FUTURE DIRECT AND INDIRECT ECONOMIC AND SOCIAL BENEFITS. THE FEARS OF TECHNOLOGY HOLDERS CONCERNING SUCH MATTERS WILL BE AGGRAVATED INsofar AS THEY HAVE REASON TO BELIEVE THAT THE ENFORCEMENT AUTHORITIES WILL NOT HAVE ACCESS TO ALL OF THE INFORMATION THAT WOULD BE NECESSARY FOR MAKING SOUND JUDGEMENTS AND ESTIMATES. SOME OF THAT INFORMATION MIGHT PERTAIN TO THE ECONOMIC AND SOCIAL CIRCUMSTANCES OF THE HOST COUNTRY ITSELF. OTHER PERTINENT INFORMATION MIGHT INCLUDE PROPRIETARY DATA WHICH

ARE IN THE POSSESSION OF THE TECHNOLOGY HOLDER BUT WHICH COULD BE COMPILED IN THE NECESSARY FORM ONLY WITH CONSIDERABLE DIFFICULTY AND EXPENSE, OR WHICH THE TECHNOLOGY HOLDER WOULD BE RELUCTANT TO DISCLOSE BECAUSE OF ITS FEAR

THAT COMPETITORS MIGHT SOMEHOW GAIN ACCESS TO THOSE DATA, THEREBY UNDERMINING THE BUSINESS PROSPECTS OF THE TECHNOLOGY HOLDER IN OTHER COUNTRIES, PERHAPS INCLUDING THE UNITED STATES.

-- D) DISCUSSIONS CONCERNING THE DESIRABILITY OF A CODE OF CONDUCT ON TRANSFER OF TECHNOLOGY HAVE GENERALLY INCLUDED THE PREMISE THAT THE CODE OF CONDUCT WOULD BE INSTITUTED THROUGH AN INTERGOVERNMENTAL AGREEMENT OR TREATY, CALLING FOR COOPERATIVE ENFORCEMENT MEASURES BY THE GOVERNMENTS OF THE TECHNOLOGY-EXPORTING COUNTRIES WITH THE GOVERNMENTS OF THE TECHNOLOGY-IMPORTING COUNTRIES. FOR THE UNITED STATES AND OTHER NON-SOCIALIST DEVELOPED COUNTRIES, SUCH AN AGREEMENT WOULD CONSTITUTE A CONSIDERABLE EXPANSION OF GOVERNMENTAL SUPERVISION OVER CERTAIN INTERNATIONAL ACTIVITIES OF THE DOMESTIC PRIVATE SECTOR. THIS WOULD REPRESENT AN UNDESIRABLE EXPANSION OF GOVERNMENTAL INFLUENCE IN THE DOMESTIC ECONOMY. MOREOVER, IT WOULD PUT THE GOVERNMENT IN THE POSITION WHERE IT MIGHT LATER BE COMPELLED TO TAKE SIDES IN DISPUTES BETWEEN ONE OR MORE U.S. COMPANIES AND ONE OR MORE FOREIGN GOVERNMENTS, POSSIBLY WITH SOME DAMAGE TO INTERNATIONAL RELATIONS.

UNCLASSIFIED

PAGE 04 STATE 105775

3. IN BRIEF, IT IS BELIEVED THAT THE BEST CONCEIVABLE CODE OF CONDUCT WITH REGARD TO THE TRANSFER OF TECHNOLOGY WOULD BE CONTRARY TO THE INTERESTS OF TECHNOLOGY HOLDERS AND THEIR HOME COUNTRIES, AND WOULD BE EVEN MORE CONTRARY TO THE INTERESTS OF THE DEVELOPING COUNTRIES. IT WOULD TEND TO IMPEDE, RATHER THAN TO PROMOTE, THE ACCESS TO MODERN TECHNOLOGY THAT "REPRESENTS ONE OF THE BASIC CONDITIONS FOR SOCIO-ECONOMIC DEVELOPMENT OF ALL COUNTRIES AND THE MAINTENANCE OF WORLD PEACE AND INCREASE IN OVERALL PROSPERITY."

4. IN CONNECTION WITH THE FOREGOING, SOME MEMBERS OF THE COUNCIL BELIEVE SPECIAL ATTENTION SHOULD BE GIVEN TO THE NEED TO CLARIFY THE FACTUAL SITUATION ASSOCIATED WITH CURRENT TRANSFERS OF TECHNOLOGY. PROPONENTS OF A PUGWASH-TYPE CODE OF CONDUCT HAVE CONTENDED THAT SUCH A CODE IS NECESSARY TO PROTECT DEVELOPING COUNTRIES FROM THE ABUSES THEY BELIEVE HAVE BEEN ASSOCIATED WITH UNCONTROLLED TRANSFERS. THAT BELIEF HAS BEEN FOUNDED PRIMARILY ON A NUMBER OF STUDIES INDICATING THE PREVALENCE OF SUCH ABUSES, INCLUDING TIE-IN ARRANGEMENTS COMPELLING TECHNOLOGY RECIPIENTS TO PURCHASE IMPORTS FROM TECHNOLOGY SUPPLIERS

AT EXHORBITANT PRICES. THE RELIABILITY OF THOSE STUDIES SHOULD BE CAREFULLY EXAMINED AND--IF THAT EXAMINATION HAS THE RESULTS INDICATED BY A PRELIMINARY ANALYSIS BY THE COUNCIL--SHOULD BE VIGOROUSLY REFUTED.

5. THE COUNCIL OF THE AMERICAS ALSO REITERATES THE VIEWS PREVIOUSLY EXPRESSED CONCERNING CHAPTERS III, IV, AND V OF THE PUGWASH WORKING GROUP'S DRAFT CODE OF CONDUCT AND ADDS THE FOLLOWING COMMENTS CONCERNING SUB-ITEMS III AND V-XI OF ARTICLE 4 OF CHAPTER III:

-- SUB-ITEM III WOULD BE ACCEPTABLE PROVIDED THAT THE SUPPLIER WERE EXPLICITLY IDENTIFIED AS THE EXCLUSIVE JUDGE OF WHETHER ANY REQUIREMENT IS OR IS NOT "UNWARRANTED". WHENEVER A SUPPLIER'S IDENTITY, AND THEREFORE ITS REPUTATION, ARE ASSOCIATED WITH THE USE MADE OF THE TECHNOLOGY, THE SUPPLIER MUST PROTECT ITSELF BY ESTABLISHING THE STANDARDS IT CONSIDERS NECESSARY FOR SUCH USE. THIS IS PARTICULARLY THE CASE WHERE TRADEMARKS ARE EMPLOYED.

UNCLASSIFIED

PAGE 05 STATE 105775

SUPPLIERS WILL BE UNWILLING TO RELINQUISH CONTROL OVER THE USE OF THEIR TECHNOLOGY BY ALLOWING GOVERNMENT OFFICIALS TO DETERMINE WHETHER ANY PARTICULAR STANDARD ESTABLISHED BY THE SUPPLIER IS OR IS NOT WARRANTED.

-- SUB-ITEMS V-X ARE ACCEPTABLE, BUT WITH THE UNDERSTANDING THAT THEY ARE TO BE NON-BINDING.

-- SUB-ITEM XI WOULD NOT BE ACCEPTABLE. IT WOULD WORK AGAINST THE INTERESTS OF BOTH LICENSOR AND LICENSEE. IT IMPLIES BELIEF THAT THE TECHNOLOGY TRANSFERRED IS NORMALLY TRANSFERRED ON A ONE-SHOT BASIS AND THAT ONLY R&D ACTIVITIES BY THE LICENSEE CONTINUE ON AN ON-GOING BASIS. IN FACT, THE SUPPLIER ORDINARILY MUST, AND DOES, CONTINUE CLOSE TO THE LICENSEE, HELPING THE LATTER ADAPT THE TECHNOLOGY TO THE CONSTANTLY CHANGING LOCAL SITUATION AND, INDEED, MODIFYING THE TECHNOLOGY ITSELF FOR THAT PURPOSE. INFORMATION DEVELOPED BY THE LICENSEE IN CONNECTION WITH USE OF THE TECHNOLOGY CAN THEREFORE BE OF CONSIDERABLE HELP TO THE LICENSOR IN ADAPTING OR IMPROVING THAT TECHNOLOGY FROM THE POINT OF VIEW OF THE LICENSEE AS WELL AS THE LICENSOR. THIS IS NOT TO DENY, HOWEVER, THAT THE LICENSEE SHOULD HAVE THE OPPORTUNITY TO DERIVE THE PROFITS DUE TO IT FOR ANY GENUINE TECHNOLOGICAL BREAKTHROUGHS THAT IT MAY HAVE EFFECTED THROUGH ITS OWN EFFORTS AND INDEPENDENTLY OF THE ASSISTANCE RECEIVED INITIALLY AND ON AN ON-GOING BASIS FROM THE LICENSOR. UNQUOTE. KISSINGER

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